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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-237

Yolanda Aquilar et al., Appellants

v.

Betty-Louise Felton, et al., Appellees

No. 84-238

Secretary of Education, Appellant

v.

Betty-Louise Felton, et al., Appellees

No. 84-239

Chancellor, Bd. of Education of New York, Appellant

v.

Betty Louise Felton, et al, Appellees

Consolidated Cases

On appeal from the United States Court of Appeals for the Second Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Council for American Private Education, American Education Coalition, Association for Public Justice, Free Congress Research and Education Foundation, National Association for the Legal Support of Alternative Schools, National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education in Support of the Appellants

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Council for American Private Education (CAPE) is a Washington D.C. based organization serving elementary and secondary private education. Fifteen national private school organizations comprise the membership of CAPE: the American Lutheran Church; the American Montessori Society; the Association of Evangelical Lutheran Churches; the Association of Military Colleges and Schools of the United States; Christian Schools International; Friends' Council on Education; the Lutheran Church, Missouri Synod; the National Association of Episcopal Schools; the National Association of Independent Schools; the National Association of Independent Schools; the National Association of Private Schools for Exceptional Children; the National Catholic Education Association; the National Society for Hebrew Day Schools; Seventh Day Adventist Board of Education, K-12; Solomon Schechter Day School Association; and the United States Catholic Conference. Together these organizations operate about 15,000 private schools enrolling approximately 4.2 million students, or over 80% of the nation's private school students. Member organizations are non-profit and subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. This brief does not purport to reflect the views of all members of the Council but is based upon policies adopted by the Board of Directors of the Council.

The American Education Coalition is a national organization which emphasizes grass roots, local and familial control and involvement in education, as ways to improve the quality and effectiveness of education.

The Association for Public Justice is a Washington, D.C. based, non-profit, voluntary association of Christian citizens attempting to address issues of structural justice in many areas of public policy, including the education arena.

The Free Congress Research and Education Foundation is a Washington, D.C. based, non-profit association engaged in a variety of research and educational projects. It operates through two institutions, The Institute for Government and Politics and The Child and Family Protection Institute, which are concerned with issues of freedom of education.

The National Association for the Legal Support of Alternative Schools (NALSAS) is a national information and legal service center located in New Mexico. NALSAS is designed to research, coordinate and support legal actions involving non-public educational alternatives. NALSAS helps interested persons and organizations locate, evaluate, and/or create viable alternatives to traditional schooling approaches.

The National Coalition of Alternative Community Schools (NCACS) is a non-profit organization of people engaged in the challenge of securing the benefits of an egalitarian society for all people, regardless of race, religion, sex or age. The members of NCACS believe in utilizing educational processes to develop the full human potential of every individual. NCACS members are from diverse backgrounds and approach the task of creating an economically democratic society through many different means. For example, NCACS assists families who are involved in educating their children at home, and supports the creation of alternative schools that exemplify the concepts of democratic process and self government.

Parents Acting for Choice in Education (PACE) is a New York based, non-profit organization of people desiring to help parents understand and fulfill their responsibilities toward the education of their children, to promote increased public awareness about the proper role of government in education, and to strive to assure freedom of choice in education for all who desire it.

Amici include all the major national organizations involved in nonpublic education, as well as voluntary associations of taxpayers and parents concerned with the quality of education of all American children, whether they attend public or non-public schools. The Elementary and Secondary Education Act of 1965, as amended, challenged in this litigation is premised on the view that federal financial assistance in education, which supplements and does not supplant the primary role of the state and local governments in education, may within appropriate limits be made available to all children in

all schools. Hence amici organizations that are engaged in nonpublic education would be directly affected by the decision of this Court in this case.

Other amici are primarily concerned with parental rights in educational matters. These rights are acknowledged as part of the patrimony of humankind in the Universal Declaration of Human Rights adopted in 1948 by the United Nations General Assembly. Over two decades before the adoption of this declaration, this Court unanimously invalidated a provision of the Oregon State constitution that would have eliminated parental choice in the education of their children. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The freedom of parents to choose the form of education they deem appropriate for their children is among the legitimate purposes of the legislation challenged in these cases.

Both groups of amici have vital interests in the outcome of this litigation and cannot reasonably expect their views to be presented fully to this Court by the parties. For the foregoing reasons, amici respectfully move this Court for leave to file this brief to urge this court to reassert its teaching that "the State has . . . a legitimate interest in facilitating education of the highest quality for all children . . . whatever school their parents have chosen for them " *Wolman v. Walter,* 433 U.S. 229, 262 (1977) (Powell, J., concurring and dissenting) and its teaching adumbrated in *Pierce* and developed in subsequent decisions concerning familial privacy that parents retain an important interest in exercising educational choice.

Amici have sought permission of the parties to participate and have received consent by telephone. The expedited briefing schedule necessitates the filing of this motion.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The interests of the amici in the instant litigation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. THE INCLUSION OF DISADVANTAGED STUDENTS ATTENDING NONPUBLIC SCHOOLS WITHIN A BROADLY AVAILABLE FEDERAL PROGRAM IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE

A. THE CONGRESSIONAL STATEMENT OF PURPOSE - PROMOTING THE VALUE OF EDUCATIONAL PLURALISM - CONSTITUTES A VALID SECULAR PURPOSE

B. THE NEW YORK PLAN OF IMPLEMENTING THE FEDERAL STATUTE (TITLE I) DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING OR INHIBITING RELIGION

1. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS TO DISADVANTAGED STUDENTS RATHER THAN TO RELIGIOUS INSTITUTIONS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

2. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS ON A NONDISCRIMINATORY BASIS TO A BROAD CLASS OF DISADVANTAGED STUDENTS ATTENDING PUBLIC AND NON-

PUBLIC SCHOOLS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

3. ADMINISTRATION OF TITLE I EDUCATIONAL BENEFITS PROVIDES ADEQUATE SAFEGUARDS THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

4. ADMINISTRATION OF TITLE I EDUCATIONAL BENEFITS DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF INHIBITING RELIGION BY ENTANGLING THE GOVERNMENT EXCESSIVELY IN RELIGIOUS AFFAIRS

5. THE CONGRESSIONAL DESIGN IN TITLE I SHOULD NOT BE INVALIDATED ON THE CONJECTURAL BASIS THAT IT MIGHT PRODUCE INTOLERABLE "POLITICAL DIVISIONS ON RELIGIOUS LINES"

II. THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN EXERCISING ITS TAXING AND SPENDING POWER TO CREATE A FLEXIBLE PROGRAM OF FINANCIAL SUPPORT THAT SUPPLEMENTS BUT DOES NOT SUPPLANT THE PRIMARY ROLE OF THE STATES IN PROVIDING EDUCATION

III. THE INTENT OF THE FRAMERS OF THE RELIGION CLAUSES IS MANIFEST IN LEGISLATION OF THE FIRST CONGRESS SUPPORTING EDUCATION IN THE FEDERAL ENCLAVES CARRIED ON BY RELIGIOUS BODIES. A FORTIORI, THE HISTORIC PURPOSES OF THE RELIGION CLAUSES ARE NOT OFFENDED BY A PROGRAM IN WHICH PUBLIC SCHOOL EMPLOYEES RATHER THAN EMPLOYEES OF A RELIGIOUS BODY TEACH SECULAR, NOT RELIGIOUS, SUBJECTS TO

DISADVANTAGED CHILDREN IN PUBLIC AND NON-PUBLIC SCHOOLS.

ARGUMENT

I. THE INCLUSION OF DISADVANTAGED STUDENTS ATTENDING NONPUBLIC SCHOOLS WITHIN A FEDERAL PROGRAM BROADLY AVAILABLE TO STUDENTS IN PUBLIC AND NONPUBLIC SCHOOLS IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE

A. THE CONGRESSIONAL STATEMENT OF PURPOSE - PROMOTING THE VALUE OF EDUCATIONAL PLURALISM - CONSTITUTES A VALID SECULAR PURPOSE

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan*, 446 U.S. 646 (1980), Justice White wrote:

> Establishment Clause cases are not easy, they stir deep feelings, and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. *id.* at 662.

Although Establishment Clause cases are not easy, this Court has never adopted the view that this Clause supports an attitude of hostility towards religious institutions that might derive some indirect benefit from a program providing educational benefits to disadvantaged children attending public and non-public schools, such as the legislation challenged in this litigation.

The basic purpose of the Establishment Clause is, of course, "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). As Chief Justice Burger stated in *Walz*, short of expressly proscribed governmental acts that would either establish religion or interfere with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *id.*

In the legislation challenged in these consolidated cases Congress did not provide for any direct governmental subsidy of any particular religious group or of religious groups in general. Nor, given our scheme of federalism, did the Congress make bold to supplant the rightful place of primacy enjoyed by state and local governments in providing educational benefits to the nation's children. On the contrary, the Congress expressly stated that the program it undertook in Title I of the Elementary and Secondary Education Act of 1965,[1] 20 U.S.C. § 2701 *et. seq.* was designed "to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children." 20 U.S.C. § 3801. In creating the U.S. Department of Education, the Congress reiterated this theme of federalism, stating: "in our federal system, the primary responsibility for education is reserved respectively to the States and the local school systems." 20 U.S.C. § 3401 (4).[2]

These policies reflect a reasonable and reasoned decision of the Congress nearly two decades ago to recognize that a healthy pluralism and diversity in education is not only desirable but also necessary. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925),[3] Justice McReynolds wrote for a unanimous Court:

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[1]Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. The unreported decision of the District Court, and the reported decision of the Court of Appeals, 739 F.2d 48 (2d Cir. 1984), uniformly refer to Title I and the regulations issued thereunder, see 45 C.F.R. Part 116a (1979), and for clarity's sake amici shall do likewise.

[2]The Education Amendents of 1974 strengthened the provisions of Title I requiring comparable and equitable services for private school children by adding enforcement procedures that could be implemented against states failing to meet their statutory obligation to provide those comparable and equitable services. Pub. L. 93-380, 88 Stat. 484, 497-99 (1974). The Education Amendments of 1978 added the requirement to 20 U.S.C. § 2740 that the expenditures for educational services for educationally deprived children in private schools "shall be equal . . . to expenditures for children enrolled in the public schools of the local educational agency." P.L. 95-561, 92 Stat. 2143, 2171-72 (1978).

[3]See S. Arons, *Compelling Belife: The Culture of American Schooling* (1982), Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harv. Ed.*

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. *Id.* at 535.

See also *Lemon v. Kurtzman*, 403 U.S. 602, 630 (1971) (Douglas, J. concurring). In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) this Court expressly acknowledged "the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools." *Id.* at 773. In *Wolman v. Walter*, 443 U.S. 229 (1973), Justice Powell observed that "the State has a legitimate interest in facilitating education of the highest quality for *all children* within its boundaries, *whatever school* their parents have chosen for them." *Id.* at 262 (Powell, J. concurring and dissenting) (Emphasis added).

Since the fostering of pluralism of educational choice is a valid secular purpose in the legislation of several states,[4] which have undertaken the task of providing a free public education for those who choose it or whose options are not otherwise foreclosed, it must

Rev. 76 (1976); D. Kommers and M. Wahoske, eds., *Education and Freedom: Pierce v. Society of Sisters Reexamined* (1978); and R. McCarthy, J. Skillen, and W. Harper, *Disestablishment A Second Time: Genuine Pluralism for American Schools* (1982).

[4]All relevant precedents of this Court have found a valid secular purpose in state programs of financial aid to nonpublic schools or to students attending them or to their parents, irrespective of whether these programs were sustained or invalidated on other grounds. See, e.g., *Bd. of Education v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commission*, 397 U.S. 664, 672-674 (1970); *Lemon v. Kurtzman* 403 U.S. 602, 613 (1971); *Committee for Pub. Educ. and Relig. Lib. v. Nyquist*, 413 U.S. 756, 773 (1973); *Sloan v. Lemon*, 413 U.S. 825, 827-828 (1973); *Hunt v. McNair*, 413 U.S. 734, 741-742 (1973); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 754 (1976); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Committee for Pub. Educ. and Relig. Lib. v. Regan*, 444 U.S. 646, 653-654 (1980); see also *Widmar v. Vincent*, 454 U.S. 263, 271-272 (1981); *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 1687 (1982); *Larkin v. Grendel's Den*, 103 S. Ct. 505, 508 (1982).

[5]This Court so ruled with respect to federal legislation in *Tilton v. Richardson*, 403 U.S. 672, 678-679 (1971).

likewise be a valid secular purpose for the Congress,[5] which has not supplanted the states but only supplemented the educational endeavors of the states.[6] It should not be thought that the Establishment Clause can or should be used as a bludgeon to strike down any and all forms of support, however indirect, for nonpublic education. The Religion Clauses were adopted long before states had public school systems and cannot fairly be viewed as protecting an absolute monopoly of governmental resources for the schools that the government maintains and operates.

It is, moreover, regretable that the twin values of governmental neutrality in religious matters and parental freedom in the education of their children should be viewed as competing or in conflict with one another. At a recent conference in Washington, D.C., John J. Gilligan, a prominent public policy maker who has served in the legislative and executive branches of government at the local, state, and federal levels, expressed concern over the fruitless character of pitting these values against one another. Referring to his experience as Governor of Ohio, Gilligan noted:

> My own experiences as Governor of Ohio in the early Seventies, in a state which had its fair share of all of the problems afflicting education today, convinced me that there were two major impediments to dealing successfully with our educational problems. First, there was the propensity of those in government to think in terms of an educational institution which had passed into oblivion 15 or 20 years earlier. In other words,

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[6]In *Nyquist*, the Chief Justice argued: "It is no more than simple equity to grant partial relief to parents who support the public schools they do not use." 413 U.S. 756, 803 (Burger, C.J., dissenting). The majority in *Nyquist* did not accept this suggestion because "[t]he grants to parents of private school children are given in addition to the right that they have to send their children to public school 'totally at state expense.' " *Id.* at 782, n. 38. This reply to the equity argument is, of course, unavailing in the instant case because Congress has not undertaken to provide a federal entitlement to have children educated in free federal schools. For this very reason, Members of Congress might consistently with their oath of office to uphold the U.S. Constitution, and with their plenary power to enforce the Equal Protection Clause by appropriate legislation, Am. XIV, §5, legitimately decide to include disadvantaged children attending church-related schools within a general program designed to meet the special educational needs of all disadvantaged children in the nation.

they tended to think in terms that no longer applied to the current situation, and to deal with the problems to an earlier period rather than those of the present or the future.

Second, and even more threatening to any hope of finding a solution to the problems of the Eighties and Nineties in the field of education, was the evident instinct of educators and educational administrators - perhaps understandable in the light of what appeared to be dwindling moral and financial support for education - to divide the educational universe into separate and rival domains and duchies: public schools against private; academic programs versus vocational training; suburbs against central cities; underprivileged children versus the affluent; minorities against majority. That tendency seemed to me then, and seems to me now, to accomplish nothing in terms of advancing the interests of one sector of education in relation to the other, but rather to provide ammunition to those who were seeking any and every rationale for curtailing support to education as a whole. Participants in this kind of fratricidal strife were - and are - thus inflicting serious damage on the very enterprise they profess to defend and serve. "Foreword" in E. Gaffney, ed., *Private Schools and the Public Good: Policy Alternatives for the Eighties* viii (1981).

B. THE NEW YORK PLAN OF IMPLEMENTING THE FEDERAL STATUTE DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING OR INHIBITING RELIGION

The most critical test under the Establishment Clause for scrutinizing the federal statute challenged here is the primary effect test, according to which legislation may not have the result of either advancing or inhibiting religion. See, e.g. *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669-670 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

In *Tilton v. Richardson* 403 U.S. 672 (1971), decided on the same day as *Lemon*, the Chief Justice explained the primary effect test as follows:

> The crucial question is not whether some benefit accrues to a religious instruction as a consequence of the legislative program, but whether its *principal* or primary affect advances religion. *Id.* at 679 (emphasis supplied).

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) Justice Powell clarified the primary effect test by noting that it is not fulfilled by a finding that a statute has "only a *remote* and *incidental* effect advantageous to religious institutions." *Id.* at 784, n. 89 (emphasis supplied). The most recent formulation of the test requires that legislation not have the "*direct* and *immediate* effect of advancing religion." *Larkin v. Grendel's Den, Inc.* 103 S.Ct. 505, 508 (1982).

By its terms, the primary effect text raises an empirical question. Hence judicial reliance on this test is more persuasive if trial courts produce adequate records disclosing the actual, factual results or effects of contested legislation. See, e.g., D. Moynihan, *Counting Our Blessings* 162-190 (1980), and Wilson, "The Facts Matter: The Case for Accurate Records in Constitutional Adjudication" in E. Gaffney, ed. *Private Schools and the Public Good* 189-191 (1981). Some of the leading cases of this Court relevant to the instant case, such as *Lemon, supra; Meek v. Pittenger,* 421 U.S. 349 (1975); and *Wolman v. Walter,* 433 U.S. 229 (1977), were not decided on full factual records of the actual operation of the statutes invalidated in those cases, but on meager records leading ineluctably to speculation about potential evil rather than to sound judgment about actual harm. This fact led Justice Marshall to warn in *Wolman, supra,* against needless worry about "imaginable but totally implausible evils" 433 U.S. at 260, n. 6. (Marshall, J., concurring and dissenting). As Justice Frankfurter said in another context:

> One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract . . . . The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. *New York v. United States,* 326 U.S. 572, 575, 583 (1946).

Unlike *Lemon, Meek, and Wolman*, the instant cases come before this Court upon a full record that provides a better vehicle for fashioning its teaching on primary effect in a greater clarity for the federal and state tribunals, legislators and administrators who look to the decisions of this Court for guidance.[7]

In *Nyquist, supra*, Justice Powell suggested three manageable criteria for determining the primary effect of legislation involving financial assistance to church-related schools or to students attending them. These criteria suggest that a program is less probable of having the impermissible effect of *advancing* religion (l) if the educational benefits are disbursed to individuals students or to their parents rather than directly to a religious body or to a church-related school, (2) if the educational benefits are available to a broad class of beneficiaries, and (3) if there are adequate safeguards built into the program to protect against the use of funds for religious instruction. The third criterion also guards against the possibility that the effect of a program might be to *inhibit* religion if it were administered in such a way as to constitute excessive entanglement of the government in religious affairs. Finally, this court has suggested that legislation might be impermissible if it entails "risk of significant religious or denominational control over our democratic processes, or even of deep political division along political lines" *Wolman, supra*, 433U.S. at 263 (Powell, J., concurring and dissenting).

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[7]Despite this Court's abandonment of an absolutist approach to Establishment Clause cases, see e.g., *Committee for Public Education and Religious Liberty v. Regan*, 442 U.S. 646, 662 (1980) and despite this Court's admonition against adoption of an inflexible *per se* rule in this area, see, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984); *Walz, supra*, 397 U.S. 664, 669 (1970), the Court of Appeals in the instant case virtually ignored the extensive and uncontested record of the operation of the Title I program in New York City since its inception in 1966; see *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248 (S.D.N.Y.) app. dismissed, 449 U.S. 808 (1980). Focusing instead on potential evils that have not materialized in the 18 years of this program's operation, the Court of Appeals misread *Meek, supra*, to be a "fixed, *per se* rule" requiring the invalidation of this program. This incorrect result suggests the wisdom of Chief Justice Marshall's admonition in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809), that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be construed as void." *Id.* at 128. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 408-416 (1819).

1. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS TO DISADVANTAGED STUDENTS RATHER THAN TO RELIGIOUS INSTITUTIONS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

The distinction between benefits to individuals and benefits to institutions is of overriding constitutional significance; it reflects a basic distinction between what the "effect" test is concerned with and what it is not. That test is an "institutional" test. As Justice Powell explained in *Nyquist*, it is designed to scrutinize "effect[s] advantageous to religious institutions," not individuals. *Nyquist*, 413 U.S. at 783 n. 39 (emphasis added). See also *Wolman*, 433 U.S. at 263 (Powell, J.) (separate opinion). Time and again this Court has reaffirmed the teaching of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), that state aid to individuals stands on an entirely different constitutional footing from aid to institutions.[8] In *Lemon v. Kurtzman*, Chief Justice Burger aptly summarized this principle when he stated:

> The . . . statute [at issue in Lemon] . . . has the . . . defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. 403 U.S. at 621 (emphasis added).

This is not to say that disbursement to individuals necessarily satisfies the "effect" standard.[9] As Justice Powell explained in *Nyquist*, the fact that aid is disbursed to individuals rather than institutions

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[8]For example, in *Allen* Justice White wrote that "no funds or books are furnished to parochial schools and the financial benefit is to *parents* and *children*, not to schools." 392 U.S. at 243-44 (emphasis added). Similarly, in *Everson* Justice Black stated that the "State contributes no money to the schools. It does not support them. Its legislation . . . does no more than provide a general program to help *parents* get their *children*, regardless of their religion, safely and expeditiously to and from . . . schools." *Everson*, 330 U.S. at 17-18 (emphasis added).

[9]This is also not to say that aid directly to institutions necessarily violates the "effect" standard. See, e.g., *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

does not create an irrebuttable presumption of validity but is one significant factor to be considered: *Nyquist*, 413 U.S. at 781.[10] In light of cases such as *Everson* and *Allen*, it is a highly significant factor. Justice Powell himself pointed this out in his separate opinion in *Wolman*, when he noted that individualized instructional materials, incapable of diversion to religious uses, can be provided by the State "so long as the materials are lent to the *individual students or their parents* and not to the sectarian institutions." *Wolman*, 433 U.S. at 263 (emphasis added). In making these comments, Justice Powell was explicitly distinguishing *Meek v. Pittenger*, 421 U.S. 349 (1975), where the Court held that similar loans of instructional materials directly to schools were impermissible.[11]

Most recently in *Mueller v. Allen*, 103 S.Ct. 3062 (1983) this Court reaffirmed its teaching that the distinction between benefits to students or their parents and benefits to religious institutions is a "material one in Establishment clause analysis." *Id.* at 3069. Justice Rehn-

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[10] At least three Justices—Chief Justice Burger, Justice White (the author of *Allen*), and Justice Rehnquist—would seem to rule that disbursement to individuals rather than institutions renders a program per se constitutional. According to the Chief Justice: "[T]he Establishment Clause does not forbid . . . a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship . . . [A]id to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Nyquist*, 413 U.S. at 799-801 (Burger, C. J., dissenting). Similarly, Justice Rehnquist has stated that "the impact, if any, on religious education . . . is significantly diminished by the fact that the benefits go to the parents rather than to the institutions." *Nyquist*, 413 U.S. at 812-13 (Rehnquist, J., dissenting).

[11] Justice Powell's separate opinion in *Wolman* also points out a second significant aspect of the "child benefit" doctrine of *Allen* and *Everson* - where aid is disbursed to children rather than schools, there is no concern with whether the schools are "pervasively sectarian." In *Meek* the Court employed this concept of "pervasive sectarianism" to invalidate loans made directly to church-related schools, on the ground that "[s]ubstantial aid to the educational function of . . . [pervasively sectarian] schools . . . necessarily results in aid to the . . . religious mission" as well, since the secular and religious functions are "inextricably intertwined." *Meek*, 421 U.S. at 366. As Justice Powell's *Wolman* opinion makes clear, loans to students, not schools, are permissible under *Allen*, even though the schools attended by the students are "pervasively sectarian." See also *Americans United for Separation of Church and State v. Blanton*, 433 F.Supp. 97 (M.D. Tenn) *aff'd mem.*, 434 U.S. 803 (1977).

quist conceded that "financial assistance provided to parents *ultimately* has an economic effect comparable to that of aid given directly to the schools attended by their children," but noted that, under the Minnesota income tax deduction program sustained in *Mueller*, "public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.* Indeed, Justice Rehnquist observed that, with the sole exception of *Nyquist, supra*, distinguished in *Mueller* on grounds of breadth of beneficiary class, 103 S.Ct. at 3068-3069, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Id.* at 3069. Since no such direct aid to church-related schools is allowed under Title I, which distributes educational benefits directly to educationally disadvantaged students from low-income families, this program passes constitutional muster under the primary effect test.

2. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS ON A NONDISCRIMINATORY BASIS TO A BROAD CLASS OF DISADVANTAGED STUDENTS ATTENDING PUBLIC AND NONPUBLIC SCHOOLS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION.

The judgment in *Walz v. Tax Commission supra*, sustaining property tax exemption for religious houses of worship, rested in part on the fact that the exemptions challenged in that case were available to a broad class of beneficiaries, to "*all* houses of religious worship within *a broad class* of property owned by nonprofit, quasi-public corporations . . ." *Walz*, 397 U.S. at 673 (emphasis added). *Everson, supra*, and *Allen supra*, are to the same effect; in each case the educational benefits were available not merely to nonpublic school children, but to *all* school children, regardless of whether they attended a public or a nonpublic school. By contrast, the New York legislation challenged in *Nyquist* was narrowly drawn, affording benefits *only* to nonpublic school children and their parents. Justice Powell stressed this very fact when he distinguished *Nyquist* from *Everson* and *Allen*. As Justice Powell explained:

> *Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included

> *all* school children, those in public as well as those in private schools. 413 U.S. at 783 n. 38 (emphasis in original).[12]

In *Widmar, supra*, Justice Powell likewise noted:

> [T]he benefit is available to a *broad class* of nonreligious as well as . . . religious . . . groups. . . . The provision of benefits to so broad a spectrum of groups is an important index of secular effect. 454 U.S. 263, 274 (1981) (emphasis supplied).[13]

Most recently, in *Mueller, supra*, this Court reaffirmed its teaching concerning the importance of the breadth of the beneficiary class as

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[12] *See L. Tribe, American Constitutional Law* 845 (1978) (emphasis added): "the *narrowness* of the benefited class was *a key factor* in . . . *Nyquist*."

[13] Professor Tribe has suggested that this criterion relating to the breadth of the beneficiary class is concerned primarily with perceived "symbolic identification" or governmental programs with religious interests:

> [W]hat turns on the breadth of the benefited class is not dollars—the amount of aid plainly does not depend on how many others also receive it—*but symbols; the broader the class benefited, the less likely it is that the program will be perceived as aid to religion. Id.* at 845.

Narrowly drawn legislation clearly embodies a danger of symbolic identification, since it is far more likely that such a program will be seen as conferring a special benefit on religious interests. The fact that some persons receive a benefit, whereas other similarly situated persons are excluded, tends naturally to foster a perception by those excluded of a special affiliation between the State and the benefited class. For example, if eligibility for education benefits is limited to students at nonpublic schools, as in *Nyquist*, the public's common knowledge that most such schools are sectarian, coupled with the fact that most of the children in the total student population, those in public schools, are statutorily excluded from eligibility, likely will lead to a perception that the benefits flow primarily to sectarian schoolchildren. In such a case it is clearly appropriate to look behind the statute and, through a statistical breadth analysis, ascertain whether the danger of symbolic identification is a real and probable danger.

Broadly drawn legislation presents an entirely different situation. Where all similarly situated persons (such as all parents of all schoolchildren) are eligible for benefits, as in *Everson, Allen*, and *Walz*, there is little likelihood that the program will be perceived as aid to a special group, since there is no special group which receives an eligibility preference. In such a case there is little or no danger of symbolic identification and consequently nothing to trigger the need for a statistical examination of the class of beneficiaries. The important point is that the statute treats all persons equally, such that no one group can be seen as being favored over others. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-126 (1982) and *Larson v. Valente*, 456 U.S. 228, 224-246 (1982).

an indicator that legislation does not have the impermissible effect of advancing religion. The majority in *Mueller* expressly distinguished *Nyquist* on this point, noting:

> Unlike the assistance at issue in *Nyquist*, [the Minnesota tax deduction program] permits *all* parents—whether their children attend public schools or private—to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program like [the Minnesota scheme] that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause. *Mueller*, 103 S.Ct. at 3068-3069.

Since the class benefited by Title I is broad by both congressional design, *see* 20 U.S.C. §§ 2740 and 3806(a), and by actual operation under the facts of this case, providing benefits to educationally disadvantaged students attending both public and nonpublic schools, the congressional legislation challenged here does not have the impermissible effect of advancing religion.

3. ADMINISTRATION OF THE TITLE I EDUCATIONAL BENEFITS PROVIDE ADEQUATE SAFEGUARDS THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION.

The legislative history of Title I clarifies that "public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services). . . ." S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965); *see also* H.R. Rep. 95-1137, 95th Cong., 2d Sess. 6 (1978). In addition to these clear congressional mandates restricting Title I funds to nonreligious instruction, the executive branch has issued authoritative regulations governing the use of Title I funds. These regulations require the public educational agency to "exercise administrative direction and control over funds and property" used in Title I programs. 34 C.F.R. 200.70(c). In addition, these regulations specifically authorize the local public educational agency to provide Title I services to children attending nonpublic schools only through public school employees

or through contractors "independent of the private school and of any religious organizations." *Id.* 200.70(d)(1).

On the record in this case, the New York Board of Education has complied fully with the congressional intent and the federal regulations. Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. The nonpublic schools are not reimbursed for the classroom space. Both the nonpublic schools and the Title I teachers are informed that the Title I teachers have sole responsibility for selecting students for the program. The materials used in the classes have no religious content. The Board retains title to the materials and equipment used in Title I classes; the teachers are instructed to keep the materials locked in storage cabinets when they are not in use; and the materials are subject to an annual inventory. App. in No. 84-238, 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. The field supervisors answer to the Board's program coordinators, who also make occasional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matter into a class. *Id.* 13a-14a, 87a.

On this record, then, there is no empirical evidence supporting the conjecture that Title I, either by design or actual operation in New York over a period of 18 years, has the impermissible effect of advancing religion.

4. ADMINISTRATION OF THE TITLE I EDUCATIONAL BENEFITS DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF INHIBITING RELIGION BY ENTANGLING THE GOVERNMENT EXCESSIVELY IN RELIGIOUS AFFAIRS.

The value of non-entanglement of the government in religious affairs has been articulated by this Court in four distinct contexts:

(1) cases involving church property disputes, (2) cases involving governmental regulation of religious bodies or allowing a religious body to exercise a measure of governmental authority, (3) cases involving claims of religious conscience protected under the Free Exercise Clause, and (4) cases involving public financial assistance to church-related schools or to students attending them or to parents of these students.

The central, unifying theme of these cases is that the government is permitted only a severely limited role in regulating the affairs of religious bodies, lest the autonomy and integrity of these bodies be needlessly diminished.

This theme appears to be a restatement of the similar concern, articulated under the rubric of the primary effect test, that the government may not *inhibit* religion. Thus, in the context of the intra-faith church property disputes, the judicial branch of government may not involve itself in theological or canonical interpretation, but is limited to the application of neutral principles of secular law.[14] In cases involving governmental regulation of religious bodies, the judicial branch will often construe a statute or administrative regulation in such a way as to avoid a head-on collision between a governmental agency and a religious body.[15] In the context of Free Exercise claims to an exemption from provisions of an otherwise applicable statute, this Court has likewise expressed concern over excessive entanglement either of the government in religious affairs or, occasionally, of religious bodies in governmental affairs.[16] And

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[14]*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Church of the Holy Trinity v. United States* 143 U.S. 457 (1892); *Gonzalez v. Archbishop* 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Presbyterian Church v. Mary Elizabeth Blue Hall Churck*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979).

[15]*See*, e.g., *Bob Jones University v. United States*, 103 S.Ct. 2017 (1983); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 507 (1979; *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *California v. Grace Brethren Church*, remanded on jurisdictional grounds, 457 U.S. 393 (1982); and *see* Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum. L.Rev. 1373 (1981).

[16]*See*, e.g., *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (inquiry limited to sincerity, not truth or falsity, of religious belief); *United States v. Seeger*, 380

in the context of cases most closely analogous to the instant case, involving various forms of public financial aid to students attending church-related schools or to their parents or directly to the institutions, this Court has likewise been concerned with the possibility that the administration of the funding scheme might involve the government excessively in religious affairs by means of "comprehensive, discriminating, and continuing state surveillance" *Lemon, supra,* 403 U.S. at 618, of employees of a church-related school and thus inhibit the mission of the church.[17]

This Court has the opportunity in the three consolidated *Felton* cases and in *School District of Grand Rapids v. Ball,* No. 83-990, cert. granted, 104 S.Ct. 1412 (1984), to clarify its teaching concerning administrative entanglement. For in these cases the record is abundantly clear that the administration of the federal and state statutes yields the conclusions (1) that *public school employees* perform the same secular services of teaching remedial reading, English as a second language, and math skills in the public and nonpublic schools, (2) that they use the same curriculum and textbooks in public and nonpublic schools, and (3) that they have not engaged in any form of religious instruction in carrying out their professional responsibilities in public or nonpublic schools. On this record, because the nature of the programs under review makes the possibility of governmental interference with religious instruction or *inhibition* of religious autonomy but an "imaginary but totally implausible" evil, *Wolman v. Walter,* 433 U.S. 229, 260 n. 6 (1977) (Marshall, J.

U.S. 163, 185 (1965) (court may not test the truth of one's faith); *Thomas v. Review Board,* 450 U.S. 707, 714-15 (1981) (religious beliefs are given Free Exercise protection unless "so bizarre, so clearly nonreligious in motivation" as to be unworthy of credence); *United States v. Lee,* 455 U.S. 252, 257 (1982), (not within judicial function and competence to determine interpretation of religious faith). Similar concerns were reflected in two recent Establishment Clause cases; *Larson v. Valente,* 456 U.S. 228, 253 n. 29 (1982) (compliance with registration requirements of charitable solicitation statute would "penetrate deeply into the internal affairs of the registering organization"); and *Larkin v. Grendel's Den, Inc.,* 103 S.Ct. 505, 512 (1982) (grant of standardless veto to churches over granting of liquor licenses "enmeshes churches in the process of government").

[17] Since by its very terms, the excessive entanglement test turns on judicial perceptions of degrees, the results of application of this test have not been even. *Compare,* e.g., *Lemon, supra,* 403 U.S. at 618, and *Meek supra,* 421 U.S. at 369-372, with *Tilton, supra,* 403 U.S. at 679, and *Mueller, supra,* 103 S.Ct. at 3071.

concurring and dissenting), this Court should repudiate the implication drawn from *Meek v. Pittenger*, 421 U.S. 349, 369-372 (1975) that its teaching on administrative entanglement is a perverse form of circular, "catch-22" reasoning. The minimal degree of monitoring of public school employees required under the circumstances of the cases at bar, 34 C.F.R. 200.73(a), to ensure against governmental *advancing* of religion surely should not itself constitute proof of constitutional invalidity on grounds of governmental *inhibiting* of religion, any more than the mere fact of intradepartmental review of police behavior to insure against potential violations of the Fourth, Fifth and Sixth Amendments should constitute definitive, irrebuttable proof of impermissible conduct in the setting of an exclusionary hearing. *See*, e.g., *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984).

Since, moreover, the gist of the excessive entanglement test is the same as the prohibition against inhibiting religion found in the primary affect test, plaintiffs should not be granted third party standing to sue "on behalf of" a religious body that has allegedly suffered the harm of excessive governmental in its internal religious affairs. *Flast v. Cohen*, 392 U.S. 83 (1968), is not to the contrary, for it involved taxpayer plaintiffs who alleged that Title I injured them by *advancing*, not *inhibiting*, religion. On this view, the plaintiffs-appellees in the instant case lack standing to litigate a claim of excessive entanglement. *See also Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982); *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

5. THE CONGRESSIONAL DESIGN IN TITLE I SHOULD NOT BE INVALIDATED ON THE CONJECTURAL BASIS THAT IT MIGHT PRODUCE INTOLERABLE "POLITICAL DIVISIONS ON RELIGIOUS LINES"

In its earliest formulation in *Lemon*, *supra*, the excessive entanglement test contained the notion that judges are empowered to invalidate statutes merely because of their potential for creating "political fragmentation . . . on religious lines." 403 U.S. at 623. Like the administrative surveillance component of the excessive entanglement test, the political divisiveness component has not been applied

consistently in the decisions of this Court[18] and has been severely criticized.[19] Most recently, this Court ruled in *Mueller, supra*, that whatever vitality the political divisiveness test may once have had, it is now "confined to cases where direct financial subsidies are paid to parochial schools or teachers in parochial schools." 103 S.Ct at 3071, n. 11; *see also Lynch v. Donnelly*, 104 S.Ct. 1355, 1364-1365 (1984).

In view of the limited utility of this test arising from the narrow confines of its operation, and in view of the glaring inconsistency between this test and other tests articulated by this Court relating to other civil liberties such as freedom of the speech, *see*, e.g., *Widmar v. Vincent, supra, Brandenburg v. Ohio*, 395 U.S. 444 (1969), and freedom of the press, *New York Times v. Sullivan*, 376 U.S. 254 (1964), Amici submit that it is time for this Court to repudiate the political divisiveness test as a formal component of Establishment Clause jurisprudence. In the event that this Court still is of the view that the political divisiveness test is of continued utility in Establishment Clause cases, it should not rely on this test to invalidate Title I, for the record here reflects no evidence of intolerably "deep political divisions along religious lines." *See Wolman, supra*, 433 U.S. at 263 (Powell, J., concurring and dissenting).

II. THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN EXERCISING ITS TAXING AND SPENDING POWER TO CREATE A FLEXIBLE PROGRAM OF FINANCIAL SUPPORT THAT SUPPLEMENTS BUT DOES NOT SUPPLANT THE PRI-

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[18] Compare, *Levitt v. Committee for Pub. Educ. and Relig. Lib.*, 413 U.S. 472, 480 (1973); *Larson v. Valente*, 456 U.S. at 254; and *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. at 511, *with Walz*, 397 U.S. at 670; *Tilton*, 403 U.S. at 688-689; *Wolman*, 433 U.S. at 263 (Powell, J., concurring and dissenting); *McDaniel v. Paty*, 435 U.S. 618, 641, (1978) (Brennan, J., concurring); *Harris v. McRae*, 428 U.S. 297, 319-320 (1980).

[19] *See*, e.g., L. Tribe, *American Constitutional Law* 866-867 (1978); Esbeck, "Establishment Clause Limits on Governmental Interference With Religious Organizations," 41 Wash. and Lee L. Rev. 347, 383 (1984); Gaffney, "Political Divisiveness Along Religious Lines," 24 St. Louis U.L.J. 205 (1980); Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Ripple, "The Entanglement Test of the Religion Clauses—A Ten Year Assessment," 27 U.C.L.A.L. Rev. 1195 (1980).

MARY ROLE OF THE STATES IN PROVIDING EDUCATION

As *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), teaches, this Court is not powerless to invalidate an Act of Congress which it deems violative of the Constitution. But it is instructive that since *Marbury* was decided in 1803, only six acts of Congress have been invalidated under the First Amendment.[20] Of these cases only one, *Tilton, supra*, involved the Establishment Clause.

In the entire history of the Republic a little over a hundred federal laws have been invalidated by this Court in whole or in part.[21] By contrast, this Court has invalidated over a thousand state constitutional and statutory provisions and municipal ordinances.[22]

The sheer disproportion between invalidation of acts of Congress and of state constitutional provisions and legislative enactments cannot be explained away as a failure of nerve or a merely self-protective instinct on the part of this Court. On the contrary it reflects several themes fundamental to American constitutional jurisprudence. First, this empirical record of judicial behavior reflects a deference to constitutional determinations of the Congress as a coordinate and equal branch of government. Such deference does not, of course, strip this Court of the power to nullify an act of Congress whenever it is found to be violative of the no-establishment principle. But the very fact that this Court has invalidated only one part of one act of Congress under the Establishment Clause, *Tilton, supra*, suggests that the standard of judicial review of congressional acts such as Title I by this court is apparently less strict than that applied to dozens of state

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[20] *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *United States v. Robel*, 389 U.S. 258 (1967); *Schact v. United States*, 398 U.S. 58 (1970); *Tilton, supra; Blount v. Rizzi*, 400 U.S. 410 (1971); *Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972) (mem.)

[21] Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, 1597-1619 (1973), and 1978 *supplement* S272-S274 (1979), (listing all act of Congress held unconstitutional.) *But see INS v. Chadha*, 103 S.Ct. 2764, 2792, 2811-2816 (1983) (White, J., dissenting) (listing acts of Congress with one-House veto provisions that have been cast into constitutional doubt).

[22] *See* Congressional Research Service, *The Constitution, supra*, 1621-1785, and Supplement S276-S293 (1979).

statutes providing educational assistance to church-relating schools or to students attending these schools or to their parents.[23]

Second, this Court has traditionally deferred to the policy determinations of the Congress under the taxing and spending power. See, e.g., *Taxation With Representation v. Regan,* 103 S.Ct. 1997 (1983).

Third, this Court has likewise shown considerable deference to the Congress, and to state and local educational agencies in the financing and operation of many educational programs in this nation. See, e.g. *Wheeler v. Barrera,* 417 U.S. 402 (1974), (statutory construction of Title I allows provisions of secular services on premises of nonpublic school); *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973) (states not required under Equal Protection Clause of 14th Amendment to equalize funding of education).

The appropriate standard for this Court to adopt in the instant cases was stated by Chief Justice Marshall long ago in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819):

> The [Necessary and Proper Clause]. . . cannot be construed to restrain the powers of Congress or to impair *the right of the legislature to exercise its best judgment in the selection of measures,* to carry into execution the constitutional powers of the government. *Id.* at 420; see also at 415, 419. (Emphasis added.)

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[23] Antonin Scalia, former Asst. Attorney General, Office of Legal Counsel, and now a Circuit Judge on the Court of Appeals for the D.C. Circuit has written: "In the area of the Establishment Clause in particular, a stricter vigilance over the states makes special sense. At that level of government, the mere fact that a single religious sect is often a majority or a substantial plurality of the population, may present a real danger that legislation will aid a particular religion under the guise of pursuing secular, or at least nondenominational, goals. It is no accident that the Supreme Court decisions striking down state tuition plans in states with large Catholic populations repeatedly make a special point of the high proportion of the benefited students who attend Catholic schools. But in the national legislature, by contrast, no single sect predominates, and the Court can more readily allow educational or freedom-of-choice considerations to be expressed in tuition grant legislation, without fearing that these policy choices are really subterfuges for an imposition by a particular sect upon their fellow citizens." Scalia, "On Making It Look Easy by Doing It Wrong," in E. Gaffney, *Private School and the Public Good* 181 (1981).

III. THE INTENT OF FRAMERS OF THE RELIGION CLAUSES IS MANIFEST IN LEGISLATION OF THE FIRST CONGRESS SUPPORTING EDUCATION IN THE FEDERAL ENCLAVES CARRIED ON BY RELIGIOUS BODIES. A FORTIORI, THE HISTORIC PURPOSES OF THE RELIGION CLAUSES ARE NOT OFFENDED BY A PROGRAM IN WHICH PUBLIC SCHOOL EMPLOYEES RATHER THAN EMPLOYEES OF A RELIGIOUS BODY TEACH SECULAR, NOT RELIGIOUS, SUBJECTS TO DISADVANTAGED CHILDREN IN PUBLIC AND NONPUBIC SCHOOLS.

This Court has often made use of legal history as a way of discharging its responsibility of explaining to the nation the reasons that undergird its constitutional holdings. As Justice Brennan has written: "The existence from the beginning of the Nation's life of a practice . . . is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations.... This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring). See also *Marsh v. Chambers*, 103 S.Ct. 3330, 3332-3336 (1983); *Larkin v. Grendel's Den*, 459 U.S., 116, 122-123 (1982); *Larson v. Valente*, 456 U.S. 228, 244-245 (1982); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Lemon v. Kurtzman*, 403 U.S. 602, 625-642 (1971)(Douglas, J., concurring), and 642-661 (Opinion of Brennan, J.); *Walz v. Tax Commission*, 397 U.S. 664, 704-727 (1970) (Douglas, J., dissenting), *Abington School District v. Schempp*, 374 U.S. 203, 230-304 (1963)(Brennan, J. Concurring), and *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and 63-72 (Rutledge, J., dissenting).

In the instant cases, the provision of federal funds in Title I for children attending nonpublic as well as public schools comes to this Court with historical antecedents as old as those deemed dispositive in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983). As the Chief Justice noted in *Marsh*, historical evidence sheds light not only on what the

draftsmen intended the Establishment Clause to mean,[24] but also "on how they thought that clause applied to the practice authorized by the First Congress." It is noteworthy that the same members of Congress which enacted the Bill of Rights also voted overwhelmingly in support of the Northwest Ordinance, which provides in part: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ch. VIII, 1 Stat. 50,53,(1789). More important is that the First Congress and subsequent Congresses appropriated funds for education in the federal territories conducted by organized religious bodies, and that those federal funds were provided directly to religious institutions. R. Cord, *supra*, note 24, at 41-46 and 57-73, and C. Antieau et.al, *supra*, note 24, at 126. *A fortiori*, the historic purposes of the Religion Clauses are not offended by a program such as Title I, in which public school employees rather than employees of a religious body teach secular rather than religious subjects to disadvantaged children attending both public and nonpublic schools.

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of

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[24]See the careful reassessment of the historical evidence relating to original intent of the Religion Clauses in the Amicus brief of the United States Catholic Conference. And see E. Corwin, "the Supreme Court as a National School Board," 14 Law & Contemp. Probs. 3 (1949); E. Norman, *The Conscience of State in North America* (1964); J. O'Neill, *Religion and Education Under the Constitution* (1949); C. Rice, The *Supreme Court and Public Prayer* (1964); C. Antieau, A. Downey, E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964); M. Howe, *The Garden and the Wilderness* (1965); A Sutherland, "Historians, Lawyers, and 'Establishment of Religion,'" in D. Gianella, ed., V *Religion and the Public Order* 27 (1969); L. Levy, "No Establishment of Religion: The Original Understanding," in *Judgments: Essays on American Constitutional History* 169 (1972); W. Berns, *The First Amendment and the Future of American Democracy* (1976); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. M. Malbin, *Religion and Politics*, note 24, *supra*, at 9, 15.

A more recent historical study confirms Malbin's conclusions. Professor Robert Cord summarizes his own findings as follows:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an absolute separation or independence of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. R. Cord, *Separation of Church and State*, note 24, *supra*, at 15.

Opponents of legislation such as that under review in the instant cases frequently make reference to the anti-establishment perspective of James Madison. For example, Madison's famous Memorial and Remonstrance in the Virginia House of Burgesses against Patrick Henry's proposal to use public funds to support Christian teachers of religion has been attached to dissenting opinions in *Everson*, 330 U.S. at 63-72, and *Walz*, 397 U.S. at 719-727. Historians have noted

the weakness of relying on the struggle in Virginia over Patrick Henry's bill as a way of understanding the mind of the Framers. For example, Professor Leonard Levy writes:

> [T]he details of no other state controversy over church-state relationships are so familiar. If, however, one is concerned with attempting to understand what was meant by "an establishment of religion" at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals. Indeed, the abortive effort in Virginia to enact Patrick Henry's assessment bill is less important that the fact that five states actually had constitutional provisions authorizing general assessments for religion, and a sixth (Connecticut) provided for the same by statute. Had the assessment bill in Virginia been enacted it would simply have increased the number of states maintaining multiple establishments from six to seven. L. Levy, "No Establishment of Religion: The Original Understanding," note 24, *supra*, at 201.

It was Madison, moreover, who suggested that the meaning of a constitutional provision is to be ascertained from considering the "true sense in which it was adopted by the states." Letter to Thomas Ritchie, September 15, 1821, in G. Hunt, ed., IX *Writings of James Madison* 272 (1909). At the Virginia convention in 1788 called to ratify the new Constitution adopted in Philadelphia, Madison himself stated:

> Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment.... The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest. J. Elliott, Ed., III *Debates on the Federal Constitution* 330 (1836).

Professors Antieau, Downey, and Roberts have suggested that the views expressed at the Delaware General Assembly, which ratified the First Amendment on January 27, 1790, were fairly representative of the prevailing view in the other ratifying states. Antieau and his colleagues summarized those views as follows:

> The people of Delaware had come to believe during the period of the ratification of the First Amendment that participation in religious exercises should be voluntary. This did not mean that the state must be blind to religion as an institution in the lives of her citizens; the morality and prosperity of the community depended upon religion. Thus the state could recognize and protect religion, provided that this official recognition was extended on a nonpreferential basis . . . . C. Antieau et al., *Freedom from Federal Establishment*, note 24, *supra*, at 147.

In this view, the Religion Clauses were understood to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." Id. at 160; see also W. Berns, *The First Amendment and the Future of American Democracy* (1976).

When Madison was elected to the First Congress and served as floor manager of the First Amendment, he did not depart from this view that the First Amendment was intended to prohibit a *nationally* preferred religion. This may be seen in the version of the First Amendment that Madison submitted to the House of Representatives: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789).

Madison also endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter to M.L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the Appellants. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau et al., *Freedom from Federal Establishment* (1964), and R. Cord, *Separation of Church and State* (1982), *supra*, note 24.

The original meaning of the Establishment Clause is reflected, for

example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833).

If legal history is to be employed in the resolution of Establishment Clause cases such as the cases at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by this Court in *Everson*. As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers - or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978).

The federal statute challenged in this case conforms to the original purpose and intent of the Establishment Clause. The statute is neutral on its face, and in its operation it is utilized by parents with students in public as well as nonpublic schools. The statute, which has been in effect for nearly twenty years, has not resulted in "imaginable but implausible" evil of the domination of any particular religion.

By reversing the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to prohibit all forms of federal assistance to disadvantaged children attending church-related schools, but to prohibit the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of California)
)SS.:
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On this _____ day of October, 1984, before me, a Notary Public for the State of California, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn to according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, a copy of the Motion for Leave to File Brief Amicus Curiae and the Brief Amicus Curiae of the Council for American Private Education et al. in support of the Appellants to the following attorneys of record:

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Sworn to and Subscribed before me the day and year aforesaid.

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